

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

POST OFFICE BOX SERVICE ENHANCEMENTS

Docket No. MC2012-26

**RESPONSE OF THE UNITED STATES POSTAL SERVICE IN OPPOSITION  
TO THE PUBLIC REPRESENTATIVE'S MOTION FOR LEAVE  
TO FILE A RESPONSE**

(July 27, 2012)

The United States Postal Service ("Postal Service") hereby provides its response in opposition to the motion of the Public Representative for Leave to File a Response, which was filed on July 26, 2012 ("Motion"). The Motion seeks authorization to file a response to the Opposition of the United States Postal Service to Mr. David B. Popkin's Request for a Presiding Officer's Information Request, filed on July 24, 2012 ("Opposition"). The Public Representative ("PR") states that it has "identified a *material misrepresentation* of the Commission's rules in the Postal Service's Opposition," [emphasis added] and that it "believes that it is in the public interest to provide the Commission with the correction information..."<sup>1</sup> The Postal Service not only categorically denies the PR's allegation, but also believes that the PR's interpretation of 39 C.F.R. § 3007.3(c) is misguided.

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<sup>1</sup> Docket No. MC2012-26, Public Representative Motion for Leave to File a Response to the United States Postal Service Opposition to Mr. David B. Popkin's Request for a Presiding Officer Information Request ("PR Response") (July 26, 2012).

## Background

On July 19, 2012, the Commission received the Request of David B. Popkin for a Presiding Officer's Information Request ("Request").<sup>2</sup> The Request asked that the Presiding Officer issue an information request ordering the Postal Service to respond to ten questions concerning Attachment C of the Postal Service's Response to Order No. 1366, filed on July 9, 2012. On July 24, 2012 the Postal Service filed its Opposition to the Request.<sup>3</sup>

In its Opposition, the Postal Service argued that the Request was not consistent with the rules applicable to mail classification dockets under 39 C.F.R. § 3020.30 *et seq.* In support of its position, the Postal Service explained that these rules limit public participation to comments provided during a public comment period.<sup>4</sup> Additionally, the Postal Service noted that, unlike the rules under 39 C.F.R. § 3020.30 *et seq.*, the rules applicable to exigent rate cases specifically permit participants to submit proposed questions to the Commission.<sup>5</sup> Using, among other things, this difference in the construction of the Commission's rules, the Postal Service reasonably concluded that the Commission did not intend for participants to submit questions to the Commission in mail classification dockets.<sup>6</sup> On July 26, 2012, the PR filed its response to the Postal Service's Opposition.<sup>7</sup>

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<sup>2</sup> Docket No. MC2012-26, Request of David B. Popkin for a Presiding Officer's Information Request (July 19, 2012).

<sup>3</sup> Docket No. MC2012-26, Opposition of the United States Postal Service to Mr. David B. Popkin's Request for a Presiding Officer's Information Request ("Postal Service Opposition") (July 24, 2012).

<sup>4</sup> *Id.* at 3 (citing 39 C.F.R. § 3020.33(e)).

<sup>5</sup> *Id.* (citing 39 C.F.R. § 3010.65(c)).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> PR Response, *supra* note 1.

## Argument

First, the Postal Service categorically denies the PR's allegation that it has materially misrepresented the Commission's rules. This is a serious allegation that the Postal Service does not take lightly. The record clearly reflects that the Postal Service offered a reasonable interpretation of the procedures applicable to mail classification dockets. While the PR may disagree with the Postal Service's interpretation, it does not give the PR license to accuse the Postal Service of deliberately misrepresenting the law. Moreover, as discussed in more detail below, the rule cited by the PR does not apply in the present situation.

In its Response, filed concurrently with its Motion, the PR repeats its unwarranted allegation of misrepresentation and directs the Commission's attention to 39 C.F.R. § 3007.3(c).<sup>8</sup> In pertinent part, this rule states that "[a]ny person may request that the Commission issue a data or information request by filing a motion with the Commission, pursuant to §3001.31 of this chapter..." The PR asserts that this rule permits individuals to file motions requesting that information requests be issued in any proceeding.<sup>9</sup> Unfortunately, the PR's interpretation is misguided.

First, it is important to note that §3007.3(c) does not appear under the rules applicable to mail classification dockets (39 C.F.R. § 3020.30 *et seq.*), but appears instead in Part 3007 – Treatment of Non-Public Materials Provided by the Postal Service. If, as the PR appears to believe, §3007.3(c) permits any

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<sup>8</sup> Docket No. MC2012-26, Public Representative Response to United States Postal Service Opposition to Mr. David B. Popkin's Request for a Presiding Officer's Information Request, at 2 (July 26, 2012).

<sup>9</sup> *Id.*

participant, in any proceeding, under any circumstance, to submit proposed questions to the Commission, then its placement in Part 3007 is peculiar.

Fundamental tenets of statutory interpretation demand that a rule be read in the context within which it appears. Had the Commission intended this rule to be one of general applicability it should have placed it under Part 3001, Subpart A – Rules of General Applicability. Indeed, the Commission’s own interpretation of §3007.3(c) indicates that it did not intend for this rule to apply as broadly as the PR implies. In Order No. 194 in Docket No. RM2008-1, the Commission noted that the proposed rules under §3007.3:

only allow for persons to request access to materials or disclosure of materials after the materials have been filed with the Commission. This rule provides a mechanism for relevant materials to be filed with the Commission concurrent or prior to a request for access (under proposed rules 3007.40 or 50) [pertaining to requests for access to non-public information] or early termination of non-public status (under proposed rule 3007.31) [pertaining to requests for early termination of non-public status]. In justifying a request made pursuant to this rule, the movant should indicate whether it expects a request under proposed rule 3007.31, 3007.40, or 3007.50 will be made and a detailed statement of support explaining how the materials sought will be relevant and material to the Commission’s duties under title 39.<sup>10</sup>

This statement clearly indicates the Commission’s intent to apply this rule only in instances where participants were seeking relevant materials related to non-public information submitted by the Postal Service. Without this rule, the public would lack a procedural mechanism for encouraging the Commission to examine

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<sup>10</sup> Docket No. RM2008-1, Order No. 194: Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, at 22-23 (“Order No. 194”) (March 20, 2009). Additionally, it is important to note that the text of the proposed rule did not materially change in the final rule. *Compare* §3007.3(b) in Order No. 194, at 34 *with* §3007.3(c) in Docket No. RM2008-1, Order 225: Final Rule Establishing Appropriate Confidentiality Procedures, at 22 (June 19, 2009).

materials, or seek information, that only the Commission has access to. The Postal Service has not provided any non-public documents in this docket, nor has Mr. Popkin requested access to any non-public information. Mr. Popkin merely requests responses to very detailed questions (akin to interrogatories filed during discovery) that concern Attachment C to the Postal Service's Response, a public document.

Moreover, the Postal Service's interpretation conforms to the general construction of the Commission's rules, which specifically permit participants to submit proposed questions to the Commission in other proceedings.<sup>11</sup> If the PR's interpretation of §3007.3(c) were correct, the existence of such procedures would be superfluous. The Postal Service does not believe that the Commission would be so casual in the construction of its procedural rules. Consequently, having not sought information about (or access to) non-public materials submitted by the Postal Service, the Postal Service does not accept that §3007.3(c) provides Mr. Popkin with the procedural authority to submit proposed questions to the Commission in a mail classification docket.

Finally, it is important to keep these issues in perspective. The Postal Service has not argued, and is not arguing, that Mr. Popkin should not be able to present his concerns to the Commission. Rather, the Postal Service is simply trying to ensure that participants comply with the appropriate rules. Indeed, in keeping with the procedural rules applicable to mail classification dockets, the Postal Service invited Mr. Popkin to submit his concerns as comments.<sup>12</sup> This

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<sup>11</sup> See 39 C.F.R. § 3010.65(c).

<sup>12</sup> Postal Service Opposition, *supra* note 3 at 4.

would permit the Postal Service to provide responsive information in its reply comments, and allow the Commission to consider issuing a Chairman's Information Request.<sup>13</sup>

Were the Commission to permit Mr. Popkin to submit proposed questions under the theory presented by the PR, mail classification dockets could quickly evolve into extended, adversarial proceedings of the kind sought to be avoided in both the PAEA and the Commission's rules. Individuals opposed to the Postal Service's request could flood the docket with proposed questions, unnecessarily burdening both the Postal Service and the Commission. It does not take an oracle to imagine what the present docket would look like if every individual commenter were permitted to submit proposed questions to the Commission. Instead, as the rules already provide, and as the Postal Service believes the Commission intended, the most efficient way for participants in mail classification dockets to present their concerns is by submitting comments.

### **Conclusion**

For the foregoing reasons, the Postal Service opposes the PR's Motion and reiterates its request that the Commission deny David B. Popkin's request for a Presiding Officer's Information Request.

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<sup>13</sup> This approach worked satisfactorily in Docket No. MT2011-3 (Market Test of Experimental Product—Marketing Mail Made Easy [Now Every Door Direct Mail]). In that docket, the Postal Service's Reply Comments responded to questions and concerns raised by the Public Representative and Valpak in their comments and earlier requests that the Commission issue an information request. The Commission did not issue an Information Request, but instead noted that the Postal Service's Reply Comments responded to the participants' questions and concerns. Docket No. MT2011-3, Order No. 687: Approving Market Test of Experimental Product-Marketing Mail Made Easy, at 3 (March 1, 2011).

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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